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AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/742
22 November 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 742

Case No. 804: MANSON

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas, on 9 August 1994, Douglas Manson, a former staff member of the United Nations, filed an application requesting the Tribunal, inter alia:

"...

B. To order, as a preliminary measure, the production of the report of the Investigation Team sent to Mogadishu to investigate the theft of US$3.9 million from UNOSOM II, on which the contested decision was presumably based, the preliminary or final report of the Scotland Yard investigators into the same matter, and any other documents or communications in the possession of the Respondent material to the Applicant's responsibility in the matter of the theft and necessary for the conduct of his defence, provided that the request for production of these documents does not delay the consideration of the case by the Tribunal;

C. To order rescission of the administrative decision, dated 12 May 1994, to treat his letter of resignation, tendered in good faith on 12 May 1994, as a summary dismissal;

D. To find that the Secretary-General's conclusion, communicated to him on 12 May 1994, that he was guilty of gross negligence, resulting in the loss of US$3.9 million

from the UNOSOM compound on the evening of 16/17 April, was arbitrary, improper and contrary to the Staff Rules;

E. To adjudge and declare that he was illegally denied his right to due process;

F. To find that the Respondent, in treating the Applicant's resignation as a summary dismissal, violated the terms of the Applicant's appointment as a United Nations Development Programme (UNDP) staff member on reimbursable loan to the United Nations, and exceeded his authority;

G. To find that the contested decision has caused irreparable damage to the Applicant's good name and reputation for which remedy is due;

H. To order appropriate action to reinstate the good name and reputation of the Applicant and to remedy the damage done to him and his family."

Whereas, on 8 September 1994, the Applicant submitted a request for the immediate production of documents;

Whereas, on 18 October 1994, the Applicant submitted an additional document;

Whereas the Respondent filed his answer on 14 November 1994;

Whereas, on 17 November 1994, the Applicant again submitted a request for the immediate production of documents;

Whereas, on 22 November 1994, the Respondent submitted observations on the Respondent's request for the production of documents;

Whereas, on 15 December 1994, the Applicant submitted a renewed request for the production of documents;

Whereas, on 20 December 1994, the Respondent submitted observations on the Applicant's request for the production of documents;

Whereas, on 9 February 1995, the Applicant submitted additional documents and a request for expedited consideration of his application;

Whereas, on 15 February 1995, the Respondent submitted his views on the request for expedited consideration of the application;

Whereas, on 22 February 1995, the President of the Tribunal informed the parties that the Applicant's request for the production of documents would be considered by the Tribunal when it considered the application;

Whereas the Applicant filed written observations on 18 April 1995;

Whereas, on 5 May 1995, the President of the Tribunal informed the parties that the application would not be considered on an expedited basis;

Whereas, on 22 May 1995, the Applicant renewed his request for the immediate production of documents;

Whereas, on 22 September 1995, the President ruled that an oral proceeding would be held;

Whereas, on 9 October 1995, the Respondent submitted a set of photographs;

Whereas, on 11 October 1995, the Respondent submitted additional documents;

Whereas, on 16 October 1995, the Applicant submitted additional documents;

Whereas, on 23 October 1995, the Tribunal met with the parties and ruled on the request for the production of documents, and the Applicant submitted additional observations;

Whereas, on 24 October 1995, the Respondent delivered a document for inspection by the Tribunal;

Whereas, on 26 October 1995, the Tribunal heard the parties at a public hearing. The Applicant and the Respondent submitted additional documents;

Whereas, on 30 October 1995, the Applicant submitted comments on the documents submitted by the Respondent;

Whereas, on 31 October 1995, the Applicant submitted additional observations and amplification of his pleas, on which the Respondent provided comments on 1 November 1995;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 24 July 1962, on a one year fixed-term appointment, at the P-2, step I level, as an Administrative Officer. He served in the Congo, on a series of fixed-term appointments, until 1966, when he was transferred to UNDP. On 1 July 1970, he received a probationary appointment which became permanent on 1 March 1971. He served in UNDP Field Offices in the Sudan, India and Jordan, and undertook special assignments in Nigeria, Lebanon, and Poland. In 1978, the Applicant was appointed Director of Administration of the UN University in Tokyo. In 1986, the Applicant took early retirement. After serving as a consultant on missions to the Sudan, Finland and Afghanistan, in 1989, he again became a staff member serving in Afghanistan. In 1990, the Applicant was assigned to Cambodia and in 1991, to Liberia, where he served until December 1992. In February 1993, the Applicant was appointed Chief Administrative Officer of the United Nations Operation in Somalia (UNOSOM II), where he served until his separation on 14 May 1994.

On 17 April 1994, the Applicant reported a theft of US$3.9 million from the premises of UNOSOM II. On 19 April 1994, a Headquarters Investigation Team headed by the Chief, Investigations Unit, Office for Inspections and Investigations (OII) and including the Deputy Director, Accounts Division & Treasurer, Office of Programme, Planning, Budget and Finance, the Assistant Military Adviser, Department of Peace-keeping Operations, and the Chief, African Section, Audit and Management Control Division, OII, departed for Mogadishu to investigate the theft.

On 12 May 1994, the Headquarters Investigation Team submitted its report on the investigation to the Assistant Secretary-General for Inspections and Investigations. The report described the cash office from which the money was stolen as follows:

> "7. The cash office from which the $3.9 million was stolen was the first room as one enters the main door of Administration building B. Next, as one walks into the building, come the offices of the Chief Cashier, the Chief of Technical Services and the Director of Administration. Building B is located in the northwestern corner of the main UNOSOM compound (the U.S. Embassy compound) in Mogadishu ...
>
> 8. Administration building B is a prefabricated building with flimsy siding and windows without locks, which do not provide any security. Its entrance door was and continues to be so defective that it cannot be closed, much less locked, at any time. It is open all night. One or two of the back doors were also sometimes left unlocked or open at night. Neither the outside perimeter of the building nor any of its doors is lighted. The corridors inside the building are lighted only when the adjacent office lights are switched on. Access to the building is free at all hours of the night.
>
> 9. The door to the cash office is split horizontally in the middle and its top and lower halves each has an ordinary lock. The top half could be opened for business transactions without the person in the corridor gaining access to the room. But the top half of the door had been tampered with some time prior to the theft. As a result its lock could easily be opened with only a credit or ID card.
>
> 10. The office is about 16 by 20 feet and is divided into three areas: one, from the halved door entry to the opposite side of the room, measures 6 x 16 feet and was meant for the public; the second area, separated from the public by a counter and measuring 14 x 10 feet, was for the assistant cashier(s) who dealt with cheque payments; and the third area, constructed as a booth and measuring 14 x 6 feet, was for the assistant cashier who payed cash. This cashier's booth, although separated by a locked door from the open area of the other cashier has a 30-inch x 30-inch unlocked window with two sliding glass panels that leave an open space of 15 x 30 inches. Even with its door locked, entry into the cashier's booth can be gained easily through the 20-inch x 20-inch open window by which the cash-paying cashier transacted business with the public.

11. The prefab siding of the cash office could not withstand a forced entry. Its windows are not only flimsy but are also unlocked, and over each of them is an air conditioner that could be pulled out to gain entry into the room."

The investigation team described the circumstances of the theft as follows:

"In summary, the Security investigators found that entry into the cash office would not have been a problem to the thief or thieves. The top lock of the door appeared to have been tampered with; its support pin had been either destroyed or removed, which made it impossible for the locking mechanism to remain in place. Thus, the door could be easily opened by an ordinary credit card. An alternative mode of entry was suggested by the presence of a deep groove close to the top lock which could mean that a metal object could have been used to lever open the door. The amount of $3,900,000 was taken from the bottom drawer of the cashier's file cabinet safe (LEECO make, model TB4C-4D). The bottom drawer was locked by a key that turns a metal tongue (measuring 20mm x 5mm x 3mm) in the top center of the drawer into a slot in the frame of the safe. This metal tongue was easily wrenched out of the slot by a crowbar, the drawer opened and the money was removed.

The cash appeared to the Security investigators as having been packed in two carton boxes that were emptied of their bottled water contents.

The three drawers above the one damaged appeared to have been untouched. These three drawers contained other cash amounting to $299,790, a number of signed and blank travellers cheques, and blank cheques. Most of the other property in the office appeared to have been untouched, including several cheques ready for payment which were on top of the cashier's desk.

A stool was found behind the counter close to the inside window of the cash room partition. The Security investigators did not know its origin and speculated that its position indicated that the inside point of entry into the cash-paying cashier's booth was the window on the partition since the connecting door on the partition was locked when the crime was discovered.

The Security investigators observed that the wooden partition that set off the cash-paying cashier from the rest of the cash office was not security cleared and made obvious to money receivers the exact position and quantity of the money. They also observed that a hundred or more civilians, military and contractors paid daily could easily see where the money was kept. They concluded from indications at the crime scene that

two persons entered the building, stole the money and left through the side door that led to the rear of the Administration building and over the wall to a vast expanse of land. The Security investigators speculated that if that was the line of flight, the robbers could have made a getaway across the back wall and out of the Embassy compound between sentry posts. They also speculated that alternatively the money could have been buried somewhere in the acres of sand and scrub in back of the compound. But that whole area was searched by 80 men and nothing of interest was discovered."

The report of the investigating team contained the following findings with regard to responsibility for the theft:

"24. ... Since late 1993 cash disbursements have averaged about $10 million per month.

25 Prior to the second half of March 1994 most of the physical cash received would be disbursed each week within 24 hours of its actual delivery. The pattern was for $1.5 to $3.0 million to be delivered each Tuesday. By Tuesday or Wednesday night the remaining cash on hand was usually reduced to $100,000 to $150,000, and this cash would have to last until the following Tuesday. By the middle of March this pattern began to change, and cash started to build up.

26. The build-up in dollars occurred for several reasons. To some degree it was due to a decision made in late February 1994 to begin to pay selected vendors, who had previously received 100% of their payments in cash, with cheques or a combination of 50% in cash and 50% by cheque. The average amount of cash remittances requested from Headquarters had also increased moderately from the beginning of the year because of UNOSOM's shortness of funds on several occasions in January.

27. The weekly cash amounts required for the full month of March were requested by UNOSOM on 21 February. They were at a level which more or less matched the actual needs until the middle of March, but which was too high thereafter. This request was not amended in the second half of March as it started to become clear that cash was building up. The Chief Finance Officer of the Mission [Mr. Alfred Daubaras] departed from Somalia on 26 March.

28. On 30 March the Officer-in-Charge of Finance (a P-2) [Mr. Vincent Smith], who had to continue to perform his primary functions as Head of the Vendors' Payment Unit, requested a continuation of the cash remittances for the first three weeks of April at the same level as they had been in March. He made his calculation assuming relatively high cash expenditures and assuming that it was necessary to keep about a $1 million in cash in reserve for contingencies.

29. Starting in the middle of March the Mission also received unanticipated cash deposits directly in Somalia, totalling about $1 million. Most of this total came from one or two departing contingents which had accumulated extra cash, the remainder from the normal port tax collections, PX receipts and the like.

30. As a result of these several factors increasing cash, the total amounts on hand at the end of each day after the middle of March ranged from a low of $1-2 million right before the weekly cash deliveries to $3-5 million after the deliveries. On Tuesday, 12 April, a delivery of $3 million was made, and at the end of that day there was $4.8 million on hand. Four days later on Saturday night, 16 April, this cash-on-hand total was down to $4.2 million, $3.9 million of which was stolen."

The report charactarized the general security conditions at the Embassy Compound as "porous" and the security conditions of the Administration Complex as "lax". It described the security of the Cashier's Office as follows:

"42. The building where the Cashier's Office was located when the theft took place is a prefabricated building which could not provide adequate security for a large amount of cash for reasons noted above. No alarm system had been installed in the cash room.

43. The 'safe' in which the cash was kept could provide only minimum security even if it was used properly. It is a reinforced file cabinet with four drawers. The top drawer has a combination lock and a plunger-keylock; the three others have keylocks only. The key that secures any of these three lower drawers turns up the lock's tongue only about 3 millimeters into the slot in the cabinet's frame. However, if the slot on the right outer side of each of the three lower drawers is in the open position, pressing the plunger-keylock of the top drawer will provide a double lock to the three lower drawers. Pictures taken of the crime scene by the Security investigators immediately after the robbery was discovered, show the plunger-keylock in the pressed position. If the side slots had been in the open position, therefore, the double-lock mechanism would have been operating.

44. The Team examined this slot on the outer right side of the bottom drawer from which the $3.9 million was stolen. We found the slot undamaged. Since the plunger-keylock of the top drawer was in the pressed position, the double-lock mechanism should have been operating. If the side slot had been in the open position, allowing the double-lock mechanism to operate, the side slot would have been heavily damaged by

the seemingly forced opening of the bottom drawer. The undamaged condition of the slot meant one of the following possibilities at the time of the theft:

(a) That the side slot was in the closed position, which prevented the double-lock mechanism from operating at the time of the robbery, because neither the Chief Cashier nor the Chief Finance Officer was diligent enough to examine the security features of the file cabinet safe when it was acquired in order to ensure that they were applied. This could mean that the side slot had never been put in the open position from the time the file cabinet safe was bought and delivered to the cash office.

(b) That the side slot was in the closed position because someone deliberately closed the side slot to allow easy access by the robber(s) to the cash in the bottom drawer.

(c) That the side slot was in the open position and, therefore, the double-lock mechanism was operating at the time of the robbery, but that the robber(s) had copies of the keys to the plunger-keylock of the top drawer and to the bottom drawer containing the $3.9 million; that the keys were used to open the bottom drawer, and that the tool marks on the lip of the bottom drawer were simulated to make it appear that force was used to open the drawer."

With regard to conclusions about the theft, the investigation report discussed possible inside accomplices. With regard to management accountability for the loss, the report stated:

"56. The Headquarters Investigation Team found an incredible lack of concern on the part of the UNOSOM Administration for security in the handling and safekeeping of the large amount of cash used in the Mission.

57. ...

58. Mr. [Vincent] Smith, a P-2 who took on the duties of O-I-C [Officer-in-Charge] of the Finance Section (P-5 level duties) in addition to his full responsibilities as Chief of the Vendors' Unit, communicated his concern for the security of the cash office and the need to address it at two Section Chiefs' meetings presided over by the Director of Administration, [the Applicant].

59. ...

60. The Internal Audit observation on the audit of U.S. Dollar Cashier's Imprest Fund, UNOSOM II #7 dated 11 December 1993 (Audit No. H93/078), was addressed to [the Applicant], Director of Administration, UNOSOM II,

Mogadishu. Among other things, it raised the problem of lack of security of the cashier's office, to wit:

'Our inspection of the cashier's office indicated a number of serious deficiencies which, if not corrected immediately, would potentially lead to eventual loss of the Organizations's assets particularly considering the prevailing conditions in this Mission area ... A forced entry into the building [where the cashier's office is located] from any side would be an assured possibility. In addition, its entrance doors are made of wood with ordinary locks. The office has three ordinary glass windows, an easy entry target for thefts. The two air conditioners in the room are not secured by any iron bars; they could easily be pulled out and thereby providing easy access to the room. The safe where the bulk of the bank notes, around US$1.5 million per book, are stored is not strong enough to deter burglary; its lock can easily be destroyed and it can be moved out by four persons.

In view of the above and considering the potential risks involved, we believe the matter needs management's urgent attention to correct the deficiencies described above. Management should evaluate the cost of fortifying the cashier's office with a steel liner. In addition, there is a need to upgrade the locks, install window guards, buy a stronger safe with adequate space to store bills and install an alarm system connected to the Security and the Finance Sections to detect unauthorized entry into the room. We also believe that in order to further tighten the security of the office, a special lock with multiple keys be installed. The keys should be held by at least two officials, namely one by the cashier and one by a security officer with an alternate none of whom should have independent access to the cashier's office. In this regard, we expect the suggested improvements to the cashier's office to be done before the audit team's departure on 18 December 1993.'

61. The response from [the Applicant] dated 14 December 1993 was: 'We agree that the security of the cashier's office should be strengthened and steps are being taken to do so as soon as required materials are available.'

62. At the time of the theft, not one of the security measures recommended by the Internal Auditors had been installed.

63. The Director of Administration, [the Applicant], stated to the Team that he left it to the section chiefs responsible to take care of the problems in his/her area that were raised by the internal auditors. In the case of the security of the cash office, Mr. Alfred Daubaras, the Chief Financial Officer, was responsible, in his view, for the necessary security enhancements.

64. [The Applicant's] follow-up on the critical need for a much more secure cashier's office consisted of sending out reminder notices each

week prior to the regular section chiefs meetings on this and other items for which action was not yet completed. [The Applicant] claimed that the security of the cashier's office was achieved on 12 January 1994 when the improvements to the Somali Shilling office were completed. He further claimed that he was unaware that the substantial bulk of the cash was stored overnight in the cashier's office in the Administration building and that he had thought that the bulk of the cash was stored in another office, the Somali Shilling Office, which had had a strong room constructed in it.

65. This claim was not consistent, however, with the fact that [the Applicant's] office continued to send out reminder notices on developing a security system for the cashier's office until 7 March 1994. If it is true that he considered the cash safely stored in the Somali Shilling office after 12 January 1994 and that the cash was being moved to the Administration building only in amounts needed for daily disbursements, then [the Applicant] was unable to explain satisfactorily why did he continue to send out the reminders about it until 7 March 1994.

66. In this regard, Mr. [Alfred] Daubaras [the Chief Financial Officer's] statement to the Team that '[the Applicant] knew that the bulk of the cash was in the Administration building' and Mr. [King] Amuaben's [Acting Chief Financial Officer, successor to Mr. Alfred Daubaras] statement that 'I mentioned to [the Applicant] on at least three occasions that our cashier's office was not safe to keep such large sums of money there, and he was aware that the money was always kept in the cashier's office. The auditors had also made observation on this issue to the Administration and nothing was done about it' were considered by the Team to be more credible than those of [the Applicant].

67. Even after Mr. Vincent Smith [the Officer-in-Charge, Finance Section] discussed the cash situation and his security concerns with [the Applicant], [the Applicant] still did not concern himself with the security of the cash. As the Director of Administration, he should have then and there questioned his P-2 unofficial stand-in for a P-5 CFO how such large amounts are being protected and secured. Not to have done so was gross negligence on the part of [the Applicant].

68. [The Applicant] stated that he had not consulted with the military for security arrangements for the money because 'I don't trust the military ... I don't trust the military security.' He said he got a letter from the military to the effect that he was responsible for the security of the Administration building.

69. [The Applicant] stated that 'Mr. [Alfred] Daubaras [the Chief Financial Officer] must bear the major part of the responsibility for the theft for not ensuring that all of the necessary safeguards were in place.' He admitted, however, that 'In hindsight I certainly could have done more.'

69. The Team concludes that [the Applicant] was grossly negligent in the performance of his duties as Director of Administration particularly in regard to the institution and maintenance of adequate controls for the management and security of the large amount of cash used in the operation of UNOSOM II. This gross negligence provided the opportunity for the theft of the cash to take place."

On 12 May 1994, the same date as the Headquarters Investigation Team report, the Assistant Secretary-General for Inspections and Investigations provided the Secretary-General with a brief summary of the Investigation Team Report's conclusions, and advised him that the report has been sent to the Department of Administration and Management and the Department of Peace-keeping Operations "for appropriate disciplinary action".

On 11 May 1994, the Applicant had received a telephone call from the Assistant Secretary-General for Inspections and Investigations, together with the Assistant Secretary-General for Peace-keeping Operations and the Principal Officer, Department of Peace-keeping Operations, suggesting that he should submit his resignation. On 12 May 1994, the Applicant submitted a letter of resignation to the Under-Secretary-General, Department of Peace-keeping Operations, which stated the following:

"As the Director of Administration for UNOSOM II at the time of the theft, I was the Senior Civilian Officer ultimately responsible for all aspects of the UNOSOM II administration. Therefore, responsibility for this significant loss can only be placed in my office. I assume responsibility for the loss and submit my resignation.

I will make myself available to the Secretary-General until such time as he decides to conclude the investigations."

In a reply of the same date, the Under-Secretary-General for Administration and Management informed the Applicant as follows:

"I refer to your letter of resignation of today's date addressed to Mr. Annan [the Under-Secretary-General,

Department of Peace-keeping Operations] in which you accept ultimate responsibility, as Senior Civilian Officer for UNOSOM II, for the significant loss suffered by the Organization as a result of the recent theft of UNOSOM funds.

The investigation of the theft and of the conditions under which it was made possible has already documented that, as Director of Administration for UNOSOM II since 6 February 1993, you were grossly negligent in failing to take the most basic measures to ensure safe handling of the substantial cash amounts received and disbursed by the Mission, even after an audit report of October 1993 had pointed out to you an intolerable lack of appropriate security measures and the immediate need to take corrective action.

In view of your acceptance of ultimate responsibility and your offer to make yourself available to the Secretary-General in his continuing investigation of the theft, the Secretary-General is willing to waive the normal notice period and to accept your resignation, effective immediately, on the understanding that your separation will be treated as though it had been effected as a summary dismissal.

May I say that in view of your long and otherwise distinguished service to the Organization, I deeply regret the circumstances under which you have tendered your resignation, which have been the cause of considerable financial loss and embarrassment to the United Nations. I respect your assumption of full responsibility in this matter."

In a letter dated 9 June 1994, the Applicant requested the Secretary-General to review the decision "to treat his letter of resignation, tendered in good faith on 12 May 1994 at the request of two colleagues ..., as a summary dismissal" and the decision "to conclude, without charges, without a hearing, and without the minimum of due process that I was guilty of gross negligence ...". He requested that the letter of 12 May 1994, from the Under-Secretary-General for Administration and Management be withdrawn unconditionally. Failing that, he sought the Secretary-General's agreement to file his appeal directly with the Tribunal.

On 29 June 1994, the Director of Personnel replied to the Applicant as follows:

"This is in response to your letter of 9 June 1994 which seeks that the Secretary-General review his decision to accept your resignation as though it had been effected as a summary dismissal. You seek not only withdrawal of that decision but also seek 'public action to reinstate my good name and reputation in the eyes of the world'.

In our view, your separation from the Organization cannot be appealed as it occurred due to your own action.

We have reviewed your statement that the Secretary-General was unjustified in treating your resignation as a summary dismissal. We consider that this decision was proper. First, your letter of resignation noted that 'I assume responsibility for the loss'. In view of your admission that you were responsible for the loss, the Secretary-General, while accepting the separation based on your resignation, decided to treat your resignation as a summary dismissal. This is entirely appropriate because of your admission of responsibility. It is also justified by the fact that in December 1993 you agreed with a highly critical audit report on the way in which large sums of money were kept in the UNOSOM II compound; yet you did not do anything effective to remedy those defects which had been brought to your notice. In view of this, and because you accepted responsibility for the loss, the Secretary-General upon review and after taking into account your arguments, considers that it is up to him to take a decision based upon that assumption of responsibility.

Finally, we note that Mr. Connor's [the Under-Secretary-General for Administration and Management] letter does state that, apart from this incident, you had a long and distinguished record and so we do not think that any public apology is needed.

We note your request to submit your appeal directly to the Tribunal and we agree to that request."

On 9 August 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision of the Under-Secretary-General for Administration and Management, to treat the Applicant's letter of

resignation as a summary dismissal, was not in good faith. It was without foundation in the Staff Regulations and Rules and was therefore invalid.

2. The conclusion that the Applicant was guilty of gross negligence was based on a mistake of fact, was arbitrary, and violated his fundamental right to due process.

3. The Respondent exceeded his authority and violated the terms of his appointment in treating the resignation of the Applicant, a UNDP staff member on loan to the United Nations, as a summary dismissal.

Whereas the Respondent's principal contentions are:

1. The Secretary-General's conclusion that the Applicant was guilty of gross negligence was not an arbitrary or prejudicial act. It was a conclusion reached after appraisal of a detailed and comprehensive Report of the Investigation Team which had interviewed the Applicant and after consideration of his statement to that Team.

2. A staff member who resigns accepting responsibility for a massive theft is estopped from later denying that responsibility or its consequences. It follows that the Secretary-General's decision to accept the Applicant's assumption of responsibility and draw consequences from that assumption of responsibility is not a violation of the Applicant's rights. Nevertheless, the Respondent concedes that his decision was not preceded by the due process safeguards for summary dismissal and the Respondent has taken action to pay the Applicant all entitlements due upon a resignation.

The Tribunal, having deliberated from 23 October to 22 November 1995, now pronounces the following judgement:

I. In the early morning hours of 17 April 1994, a theft occurred of US$3.9 million in cash from a United Nations office in Mogadishu,

Somalia. The cash had been kept in what was erroneously thought to be a secure drawer of a filing cabinet located in what was then being used as a cash office in "Administration Building B". The building was a prefabricated hut-like structure, in the main UNOSOM II compound (the United States Embassy compound). Although the theft was investigated extensively, the culprits have not been identified, nor has any of the money been recovered. There is no suggestion that the Applicant was involved in or benefitted in any way from the theft. However, the Applicant, as well as the United Nations, received adverse media publicity and other criticism regarding the incident.

II. The Applicant appeals from a decision, dated 12 May 1994, (which he received the following day) by the Under Secretary-General for Administration and Management, accepting his resignation, dated 12 May 1994. The acceptance was "on the understanding that your separation will be treated as though it had been effected as a summary dismissal." In a letter dated 9 June 1994, the Applicant sought review of this decision. On 29 June 1994, the Director of Personnel, acting on behalf of the Secretary-General, informed the Applicant that the decision was considered proper. She expressed the view that the Applicant's separation from the Organization could not be appealed "as it occurred due to [his] own action." In the same letter, agreement was given by the Secretary-General to a direct appeal to the Tribunal. As the Respondent's answer does not pursue the argument of unappealability, there is no need for the Tribunal to discuss it.

III. It is not disputed that two Assistant Secretaries-General suggested to the Applicant, during a telephone conversation on 11 May 1994, that he tender his resignation. There is also no dispute that the Applicant was not told during that telephone conversation that his resignation might be treated as a summary

dismissal. The Applicant was apparently led to believe that his resignation would not be accepted and that he would remain in Somalia to assist in a continuing investigation of the episode. In fact, he did remain there until 31 May 1994. He seems to have thought that tendering his resignation would be viewed as an honourable step in recognizing his ultimate responsibility for the US$3.9 million loss since, as Director of Administration, he was the senior civilian officer responsible for the UNOSOM II administration. It is also undisputed that the Applicant was not, prior to the receipt of the summary dismissal decision, notified of any allegation against him; nor did he receive either a copy of any report relating to the investigation referred to in it, or an opportunity to respond, as provided in staff rule 110.4(a). Nor was there any submission of the matter to a Joint Disciplinary Committee under staff rule 110.4(b). The "understanding" expressed in the Under-Secretary-General for Administration and Management's letter was obviously based on a belief that the seriousness of the alleged misconduct warranted immediate separation.

IV. The Respondent seeks to justify the 12 May 1994 decision on the ground that the Applicant, for more than a year prior to the date of the theft, was

> "grossly negligent in failing to take the most basic measures to ensure safe handling of the substantial cash amounts received and disbursed by the Mission, even after an audit report of October 1993 had pointed out to [him] an intolerable lack of appropriate security measures and the immediate need to take corrective action."

The Respondent says that the resignation tendered by the Applicant was an admission of the gross negligence referred to above and that, therefore, there was no need to adhere to staff rule 110.4(a). The Respondent also contends that his conclusion that the Applicant was guilty of gross negligence was neither arbitrary nor prejudicial.

He argues that it was reached after appraisal of a detailed and comprehensive report of an investigation team which had interviewed the Applicant and after consideration of what the Applicant had said to the team during the investigation. Having reviewed what the Applicant said, the Tribunal finds that the Respondent's conclusion of gross negligence was actually not based on what the Applicant said, but on disbelief of it. For, unless one draws a tortured and unwarranted speculative inference from one sentence in the Applicant's four page single spaced statement to the Investigation Team on 3 May 1994, nothing in the statement comes even close to supporting the Respondent's conclusion of an admission of gross negligence. Moreover, the Applicant points out that his cooperation with the investigation team was not in a context of responding to allegations of gross negligence and that references to statements by others relating to him which he later saw in the report were distorted or were simply incorrect.

V. The Tribunal will consider first the contention of the Applicant that the events described above violated his right to due process under staff rule 110.4 and administrative instruction ST/AI/371. At the outset, the Tribunal addresses the question of whether the resignation of a staff member, tendered in good faith, at the suggestion of high officials of the Organization, can be accepted "on [an] understanding," not previously mentioned to the staff member. In the present case, acceptance was to be taken as recognition by the Applicant that the acceptance was equivalent to the disciplinary action of a summary dismissal for serious misconduct, with its attendant consequences regarding the repatriation grant.

VI. It appears to the Tribunal that the most elementary considerations of fairness and due process would dictate that when a resignation is tendered, whether in response to a request or not, the options open to the Secretary-General are the following: (1) to

accept the resignation as offered; (2) to reject it; (3) to initiate termination proceedings for unsatisfactory performance under the Staff Rules; (4) to initiate disciplinary proceedings in accordance with the Staff Rules; or (5) to inquire of the staff member whether he wishes to waive his rights under the staff rules, and is agreeable to the resignation being treated as a summary dismissal for serious misconduct. If the staff member is not agreeable, options (1) - (4) would, of course, remain open to the Secretary-General. The Tribunal notes that rejection of a resignation does not mean that a staff member is barred from leaving the Organization. It simply negates any inference of approval by the Secretary-General.

VII. In short, when, as in this case, a potential disciplinary measure is being considered and a resignation has been suggested, the staff member must be warned before the resignation is accepted that it will or may have a disciplinary consequence so that he or she can make an informed decision on how to respond. Considerations of fairness and respect for the rights provided under staff rule 110.4 and ST/AI/371 make this essential. In this case, however, the Secretary-General unilaterally announced the "understanding," without any such warning or observance of the Applicant's rights. The Respondent thereby deprived the Applicant of any opportunity, prior to the disciplinary action, to know what he was charged with, to examine or comment on the investigation report, or to present his position with regard to it. That does not comply with the requirements of staff rule 110.4 or ST/AI/371.

VIII. The Respondent argues that he had no practical alternative but to act as he did in accepting the resignation. The Respondent suggests that he was faced with either accepting the resignation or attempting to argue that it was not effective for the 30-day notice period required for resignations from fixed-term appointments. He

says he would then have had to formulate precise charges and dispose of the case in that 30-day period. This contention is not persuasive. The Applicant's letter of resignation did not state that he was resigning with immediate effect. The letter expressly stated that the Applicant would make himself available to the Secretary-General until such time as he "decides to conclude investigations." The Applicant's letter thus was open-ended and the Respondent was free to accept it at such time as he deemed appropriate.

IX. In support of his time-constraint argument, the Respondent cites staff rule 109.2(b). Quite apart from the open-ended nature of the Applicant's letter of resignation, there is a serious question as to whether staff rule 109.2 is applicable. Subsection (a) of that staff rule states that "a resignation, within the meaning of the Staff Regulations, is a separation initiated by the staff member" (emphasis added). On the facts here, the Applicant's resignation cannot properly be characterized as having been initiated by him. Although the Respondent argues that the resignation was not "induced," the Tribunal considers this to be a semantic quibble. There is no doubt whatever that the resignation was suggested by high officials of the Organization. More importantly, there is not the slightest indication that the Applicant had given any thought to resigning until this course of action was suggested by the two Assistant Secretaries-General.

X. Finally, in view of the fact that the Respondent based his conclusion of gross negligence on, and announced it the same day as, the date of the investigation report, the Respondent could easily have formulated and notified the Applicant of specific charges before taking disciplinary action. The Tribunal is convinced from all the evidence that the Secretary-General was not faced with any time constraint dilemma in deciding on the action to be taken with

respect to the Applicant's resignation. The Applicant argues strongly and has furnished evidence to support his contention that the Respondent's 12 May 1994 decision was a reaction to political pressure and was aimed at deflecting criticism of the Organization by pinning the blame on a scapegoat. The Tribunal will not speculate as to the Respondent's motivation; suffice it to say that there was nothing which realistically precluded the Respondent from selecting options (1) - (4) outlined in paragraph VI above, if there was no agreement along the lines of option (5).

XI. Indeed, even if a resignation were subject to staff rule 109.2, nothing in that rule bars the Secretary-General from notifying the staff member of his intention to institute disciplinary proceedings and from taking such action thereafter as may be appropriate. If the staff member, after notice of resignation, departs the Organization before the proceedings are concluded, or declines to participate in them, that would not prevent the Secretary-General from taking proper interim measures to protect the interests of the Organization. Subsequently, he could make and record a valid disciplinary decision, should that prove to be appropriate. If the Secretary-General deems that it is in the interests of the Organization to conduct a disciplinary proceeding, his ability to do so is not automatically nullified by a decision by the staff member to absent himself or herself.

XII. The conclusion that the Applicant was guilty of gross negligence, resulting in the theft of the US$3.9 million, was based on the Respondent's interpretation of the letter of resignation, on the report of the Investigation Team and on the Respondent's evaluation of reactions by the Applicant and his subordinates to observations, comments or recommendations by UN auditors who had conducted reviews of UNOSOM II activities. The Tribunal does not consider that the Applicant's resignation, having clearly been

tendered as an honourable gesture, can reasonably be interpreted as an admission of gross negligence. Moreover, it was not intended by him as such.

XIII. The issue of whether there was justification for summary dismissal is clouded by the fact that such action was taken before the Applicant ever had an opportunity to see the report of the Investigation Team as it related to him. He could, therefore, not respond to it or to the conclusions drawn by the Secretary-General regarding audit observations, comments, or recommendations. Thus it is impossible to know whether, if the Respondent had had the benefit of the Applicant's response before he acted, he would have reached the same conclusion and based a summary dismissal on it. It is also impossible to know whether the Respondent would have reached the same conclusion if he had had the benefit of the following comment contained in the report of the Scotland Yard investigation, dated 30 September 1994:

> "Earlier on, it was mentioned that the role of the NSY [New Scotland Yard] team was to advise and assist in the crime investigation. Internal disciplinary matters, whether connected or not, are normally a separate issue and dealt with accordingly by the organization concerned. However, this is an exceptional case where it is felt that some comment should be made on the administration problems that allowed the opportunity for this crime.
>
> Long term ineffective local management was the major contributing factor to this offence. Until people recognize a problem as their own it is often difficult to produce any required change as was the case here at the varying levels of management concerned in the security of the cash. This brings in the difficulty in assessing the correct blame level in the managerial pyramid. There has to be a cut off point otherwise the possible culpability of ineffective management would, on every occasion, ripple its way to the top of any organization. For this reason, Mr. DAUBARAS [the former Chief Financial Officer] is identified as the person most culpable for mismanaging the security. Others senior to him, including the auditors, had full knowledge of the problem but

> he was in a sufficiently senior position to persuade and dictate to his supervisors and subordinates what security measures should prevail."

XIV. The Respondent argues, after the fact, that nothing that the Applicant did exonerates him from responsibility. But this does not quite come to grips with the question of whether the Applicant's conduct, taken as a whole, constituted gross negligence, resulting in the loss of US$3.9 million. Gross negligence involves an extreme and reckless failure to act as a reasonable person would with respect to a reasonably foreseeable risk. Thus, to establish gross negligence, a far more aggravated failure to observe the "reasonable person" standard of care must be shown than in the case of ordinary negligence.

XV. In view of the preceding paragraphs of this Judgement, the failure to accord due process to the Applicant, in itself, would invalidate the "understanding" attached to the Respondent's acceptance of the resignation. Although it is therefore not essential that the Tribunal address the question of gross negligence, it will do so. For it would be unfair, in the extraordinary circumstances of this case, to permit the Applicant's distinguished record of UN service to be tarnished unjustly by the notion that, the due process deficiency aside, the Respondent had established that the Applicant was guilty of gross negligence. As explained below, the Tribunal is unable to find gross negligence by the Applicant.

XVI. With regard to the Applicant's sensitivity and his fidelity to the Organization concerning the protection of its funds, the Tribunal notes that in June 1993, long before the theft in question, UNOSOM II came under serious attack by hostile forces. Twenty-five Pakistani soldiers were killed and 57 wounded. Over 50 members of the Applicant's staff were trapped in their downtown office

building. The Applicant, who was at a meeting at another location when the attack was launched, requisitioned four armored personnel carriers (APCs) from a locally deployed military unit and rode in the lead APC to the downtown office building. In the face of hostile fire, he personally directed the removal of his staff plus all of the US dollar currency in the Finance Office to safety. The amount involved was over US$0.5 million. The majority of the staff was relocated to Nairobi. The Applicant, however, remained in Mogadishu to conduct other operations and oversee recovery of the local currency amounting to between US $700,000-$800,000. In addition, in recognition of the security problems involved in handling the large amounts of cash in the UNOSOM II compound, the Applicant, in April 1993, proposed a banking arrangement whereby a banking facility would have been established within the compound for all cash transactions. Had this proposal, or a variant involving a different bank, been adopted, UNOSOM II would have been relieved of the responsibility and risk of transferring and holding large sums of money. The Applicant's proposal was rejected by UN Headquarters because of questions about the bank suggested by the Applicant. It does not appear, however, that consideration was given to any other bank. In June 1993, the Applicant discussed the problem of cash security with UN officials in New York. He proposed the transfer of UNOSOM II's financial operations to Nairobi, with the exception of a skeleton staff to operate an imprest account to support local procurement operations. This proposal also would have averted or minimized cash security problems. It was rejected at UN Headquarters.

XVII. Contrary to the indication in the Under Secretary-General's 12 May 1994 letter to the Applicant that "an audit report of October 1993" had pointed out the immediate need to take corrective action with regard to appropriate cash security measures, it appears that the audit team visited Mogadishu between 29 November and 17 December

1993. Its review covered a period through October 1993. But the team had left precipitously on 17 December 1993, because of dangerous fighting and looting. It later forwarded a report attaching an audit observation dated 11 December 1993, which was received by the Applicant on 8 April 1994, nine days before the theft. Although the audit team had raised questions about cash security issues in December 1993, covering the points in the above mentioned audit observation, it departed Somalia without the final discussions that are normally conducted with responsible staff, as required by the Audit Manual. The Applicant contends that if such a discussion had been held with him, the auditors would have learned that a strong room in a concrete structure was nearing completion and that it addressed their basic cash security issues. In short, while the Applicant was doubtless informed of the audit observation before April 1994, he thought it had been resolved by construction of the strong room and that if any further action was required, the Chief Financial Officer would see to it.

XVIII. A concrete storage facility in a hardened building, affording a greater level of security than the building in which the cashier's office was located, had been completed and was available for use on 12 January 1994. The whole finance section was to be relocated to that building or to another more secure structure. The key point is that the strong room features had been initiated at the Applicant's direction, and it was usable relatively soon after the audit observations dated 11 December 1993. The measures suggested in the audit observations of 11 December 1993 were aimed at strengthening the cashier's office as it then existed. However, the prefabricated Administration building in which the cashier's office was located was not suitable for the modifications suggested. It was for this reason that, long before the 1993 auditors' visit, the decision had

been taken to construct a concrete facility with steel doors and a sliding steel grill, including a large safe. This would have provided a measure of security exceeding the recommendations of the auditors.

XIX. Contrary to the Respondent's assertions, the Applicant had not "agree[d]" with the criticisms contained in the audit observations of 11 December 1993. At the time, he was away from Mogadishu. The response to the audit observations dated 14 December 1993, referred to by the Investigation Team, was written by someone else.

XX. The Applicant points out that, in reaching its conclusion of gross negligence, the Investigation Team apparently relied on its belief that continuing reminder notices about developing a security system for the cashier's office, which had been sent out by the Applicant until 7 March 1994, showed that he had not acted properly in response to the observations of 11 December 1993. The Applicant explains that the Investigation Team never asked him what these reminder notices referred to. He says, quite convincingly, that the reminder notices referred to the new cash office, not to the small cashier's office in the building from which the theft occurred. According to the Applicant, the term "cashier's office" used in the computer-generated reminders was understood by all to mean the new hardened cash office where construction work had been going on noisily and in plain view for several weeks before the first computer-generated reminder appeared on 8 November 1993. The Applicant explains that the reference to such an item would normally remain in the computer until all its aspects were completed. During the early part of 1994, the only incomplete item was the alarm system for the new storage facility. Reference to the security system, therefore, remained on the computer-generated list. After 7 March 1994, the item was dropped from the computer because, even

without the alarm system, the storage room provided adequate security for cash. This was confirmed by the reference in UN document A/49/843, paragraph 53, dated 2 February 1995, to the report of Scotland Yard investigators, following the theft in April. The Tribunal notes that the delay in completion of the alarm system was not attributable to fault on the part of the Applicant.

XXI. The Respondent blames the Applicant for the decision to store the US$3.9 million overnight in the insecure file drawer in the prefabricated Administration building, rather than in the secure storage room. However, according to the Scotland Yard report and a statement made by one of the UN Assistant Secretaries-General, the decision was made not by the Applicant, but by the cashier. The cashier had "concluded that it was safer to keep money in his office than in the storage facility." In addition, the practice of storing cash in the file cabinet was established by the former Chief Financial Officer and was inherited from him by an individual who was serving as Acting Chief Financial Officer at the time of the theft. The former Chief Financial Officer had declined to use available security facilities (i.e., the storage room completed in January 1994) for cash. In the view of the Scotland Yard investigators, the former Chief Financial Officer's reason, namely his assessment of the security problems in the daily movement of the cash between the storage room and the cashier's office in the prefabricated Administration structure, was not justified.

XXII. The Applicant states that he was aware that cash sufficient for daily disbursements was kept in the cashier's office in the prefabricated Administration building. He assumed, however, that amounts in excess of such requirements were held in the storage room. He thought that cash was transferred to the cashier's office from the storage room in amounts needed for daily disbursements. He states that he was never informed of the size of the cash buildup as

of 16 April 1994, which resulted from a combination of two unforeseeable circumstances. First, a large amount of unanticipated cash was received from a departing military contingent. Second, an erroneous estimate of cash requirements had been made by an inexperienced individual, who had served on an interim basis for about two weeks as Acting Chief Financial Officer, following the departure of the former Chief Financial Officer, and before his successor arrived on 9 April 1994. The inaccurate estimate resulted in the receipt of far more cash than was needed. The Tribunal notes that, normally, cash received by the Somalia mission was disbursed relatively quickly and that the accumulation of a sum as large as that involved in the theft was not foreseeable.

XXIII. The Applicant says that he was unaware that over US$4 million dollars was being stored overnight in the insecure cashier's office. Perhaps the Applicant should have established a reporting system to inform him directly of the levels of cash on hand or scheduled to be received and of the storage arrangements contemplated. This, however, is a debatable matter in view of the presence of a Chief Financial Officer having primary responsibility for such details. The Applicant's failure to do so does not constitute gross negligence.

XXIV. The former Chief Finance Officer and his successor, Mr. King Amuaben (a field service officer who was serving on an acting basis because of the unavailability of a higher level staff member), stated that the Applicant was aware that the bulk of the cash was kept in the prefabricated Administration building. Their assertions, which were contradicted by the Applicant, appear to have been a major determining factor in the Respondent's conclusion that the Applicant was guilty of gross negligence. However, the former Chief Finance Officer and his acting successor, who were plainly more directly responsible for cash storage policies and decisions,

had a strong personal interest in shifting blame to the Applicant in an attempt to exculpate themselves. In this connection, the Tribunal notes that Mr. King Amuaben, the Acting Chief Financial Officer who was serving at the time of the theft was apparently so eager to distance himself from responsibility for not storing cash in the strong room on or before 16 April 1994, that he made the assertion, on 18 April 1994, during the investigation that:

> "On the morning of 16 April 1994 the Chief Cashier [Mr. Myint Swe] told me he was going to pay the local staff salaries at Somali Shillings office and so he needed some security officers to guide [sic (guard)] the place and to control the crowd. It was on this day I got to know there were two cash offices ..." (Emphasis added)

However, considerable doubt is cast on the veracity of the underscored words of Mr. King Amuaben by the following portion of the statement dated 21 April 1994, by Mr. Swe, the Chief Cashier, while he was being interrogated during the investigation:

> "... Some particular things of the 11th and 12th of April I want to tell you. On the eleventh Beatrice AKEZA was ill and did not come to the office, she went to the Pakistan Hospital. I told Mr. King [Amuaben] and he decided to close the Somalia Shillings Office so that Mr. TANEJA could come to the cashier's office to work there because Irene is a new employed[sic] and not expierecd[sic]. On the twelfth the situation was the same. ..." (Emphasis added)

Since Mr. Swe had no reason to distort these particular facts and since the illness of Beatrice Akeza was also reported by her, it seems clear that, contrary to his statement, Mr. King Amuaben knew of the Somalia Shillings Office in which the strong room was located at least several days before 16 April 1994.

XXV. The Tribunal considers that, in the circumstances, a finding that the Applicant was grossly negligent cannot properly hinge, as it obviously did here, on disputed dubious statements by self-

interested individuals. To impute gross negligence to the Applicant, against the background of his observance of reasonable standards of care in various other respects, requires a more substantial showing than such statements. On balance, the evidence falls far short of supporting a conclusion that the Applicant, who, among other things, having initiated and diligently pursued completion of the strong room, would then have passively accepted decisions by subordinates not to make proper use of it. Moreover, the Tribunal does not consider that the Applicant could reasonably have foreseen the cash build-up that occurred or a failure by his subordinates to ensure that so much cash was deposited overnight in the strong room. Nor could the Applicant reasonably have been expected to conduct detailed examinations of the premises each day to determine whether and how his subordinates were discharging their responsibilities. The Tribunal also notes that the Applicant had no control over the recruitment and assignment of the individuals who filled the post of Chief Financial Officer. That was handled by UN Headquarters, as was all the recruiting for professional posts. A significant number of those posts had remained unfilled.

XXVI. The Tribunal notes the finding of the Investigation Team that Mr. Vincent Smith, the staff member referred to above, who was unofficial Officer-in-Charge of the Finance Section during the short period between 26 March 1994 and 9 April 1994, had communicated concern for the security of the cash office, at two meetings presided over by the Applicant. This staff member does not appear to have communicated specific concerns, but rather to have spoken in generalities. The Investigation Team finding also does not speak to the situation on 16 April 1994, or to the Applicant's belief regarding the storage of excess cash. Nor is it inconsistent with the statements by the Applicant as to his understanding of the security deficiencies associated with the cashier's office, or what he had done about them. This includes his prior decision regarding

construction of the strong room, movement of the cashier's office to the secure area in the nearby building in which the strong room was located, and his reference, at a meeting of section chiefs prior to the date of the theft, to the availability of the strong room for the storage of excess cash.

XXVII. The Tribunal has also considered the variety of urgent responsibilities which were personally discharged by the Applicant, as Director of Administration, under the horrendous and violent conditions in Mogadishu in which UNOSOM II was compelled to operate. The Respondent's position is unreasonable in that it seems to rest on the notion that the Applicant, as Director of Administration, was grossly negligent if he failed to deal with every single detail personally, rather than rely on subordinates such as the Chief Finance Officer, to see to it that obvious measures for the security of cash were implemented. The Scotland Yard report comment quoted in paragraph XIII above makes this point. To be sure, not only the efforts of the Applicant in protecting UN assets and in other matters, but those of others as well, were severely handicapped by continuing serious shortages of staff and inadequate military or police support in a war-like environment. This problem had been called to the attention of UN Headquarters by the Applicant, with urgent requests for needed action, as recently as 7 February 1994. As the Applicant points out, this problem undoubtedly contributed to other wide-spread thefts of UN equipment and supplies, not only in Somalia but in other peace-keeping missions. Because it plainly made the tasks of the Applicant and his subordinates far more difficult, it cannot be minimized in any fair assessment of whether the Applicant was guilty of gross negligence.

XXVIII. Although the Applicant in his statement to the Investigation Team, dated 2 May 1994, indicated that "in hindsight, ... [he] could have done more", he has made a substantial showing that he

personally did as much as might reasonably have been expected, in the circumstances, to carry out his duties in accordance with the standards of the international civil service. He received an excellent performance rating at the end of March 1994. Since the Tribunal is considering whether the Applicant was guilty of gross negligence, that is the only point that need be addressed here. The theft was, in the opinion of the Tribunal, not attributable to gross negligence on the part of the Applicant. Primarily, it was due to wrong-headed decisions by others, coupled with the fact that the Organization was attempting a very difficult mission in an extraordinarily adverse environment, without the number or the types of personnel required, the equipment required, and without the necessary military support, or essential infrastructure support.

XXIX. It follows from the foregoing, that the Respondent exceeded his authority in attaching to his acceptance of the Applicant's resignation the "understanding" that it was equivalent to a summary dismissal for serious misconduct. Under the circumstances, there was no valid basis for unilaterally depriving the Applicant of his right to due process under staff rule 110.4. The Respondent is bound by the terms of that staff rule, just as the Applicant was bound by and entitled to the rights conferred under the Staff Rules. The Tribunal has also found, for the reasons set forth above, that the Respondent's determination that the Applicant was guilty of gross negligence was flawed. The Applicant is entitled to have that determination, along with the "understanding", expunged from his record of commendable service to the Organization.

XXX. As to the other relief sought by the Applicant, the Tribunal finds that when the Applicant tendered his resignation to the Under Secretary-General for Peace-keeping Operations, he necessarily assumed the risk that it might be accepted, despite intimations to the contrary from those who suggested that he resign. He had no

binding guarantee on that score, and he surely could not have had any certainty that the Secretary-General would not decide to accept the open-ended resignation. A suggestion that a staff member tender a resignation may be entirely understandable. That was so in the circumstances here, particularly in view of the contents of the Investigation Team Report which were known by those who made the suggestion. Although the Applicant was not obliged to comply with the suggestion, having decided to do so, he is bound by his decision. The effect of the Tribunal's conclusion regarding the invalidity of the "understanding" attached to the acceptance of the resignation is, therefore, that the resignation remains in force without the "understanding."

XXXI. The Tribunal notes the contention of the Applicant that he was on loan from UNDP to the UN and that his resignation was from the UN, not UNDP. The Applicant concludes from this that the Respondent should not have separated him from UNDP. The Tribunal finds no merit in this contention. In the first place, the Applicant's letter of 12 May 1994 suggested no such distinction as between UNDP and the UN insofar as his resignation was concerned. Secondly, the Tribunal considers that UNDP, being a subsidiary organ under the authority of the UN, is indistinguishable from it for the purposes of the resignation that was tendered in this case. Lastly, the Applicant relies on an interagency agreement regarding the loan of staff members between agencies of the common system and the UN, to which UNDP was not a party. In short, as between the UN and UNDP, the UN is not bound by that agreement. The Applicant points out that UNDP indicated that it follows a policy of adhering to the terms of that agreement when it loans staff members to other organizations, including the UN. But since UNDP is a subsidiary organ of the UN and subordinate to the authority of the Secretary-General, as Chief Administrative Officer, the latter is not obliged to follow, nor is he bound by such a policy of UNDP.

XXXII. The Applicant originally asked the Tribunal to order the Respondent to produce complete copies of the report made by his Investigation Team, as well as of the report of the Scotland Yard investigators. These pleas have been resolved by the production of the Investigation Team report and by an agreement on the part of the Applicant and the Respondent that the Tribunal should examine the Scotland Yard report and disclose to the Applicant only such portion or portions as met certain prescribed criteria. This the Tribunal has done.

XXXIII. Although the Tribunal has sustained the Applicant's position in a number of respects, the end result is that the Applicant's action constituted an effective resignation from the Organization. Accordingly, since the resignation itself involved no financial loss to him that he was not otherwise willing to accept, the Tribunal does not consider it appropriate to award any damages to the Applicant on that account. Indeed, his primary objective in this proceeding appears to have been directed against the effect on his reputation of the charge of gross negligence. References to that charge will be expunged, with such consequences as may be entailed regarding eligibility of the Applicant for future employment by the Organization, or by other members of the common system. He is, however, entitled to an award for moral injury resulting from the consequences of the failure to accord him due process. Apart from this, the Tribunal understands, based on a statement by Counsel for the Respondent at the oral hearing, that the amount to which the Applicant was entitled on resignation that was not previously paid to him, will now be paid. Because of the unjustified delay, the Tribunal awards interest at the rate of eight per cent (8%) per annum on the latter amount.

XXXIV. The Applicant has requested that the Tribunal order the Respondent to publicize in a specified manner the outcome of his appeal. The Tribunal does not find it appropriate to issue an order of that nature. However, in view of the publicity associated with this matter which was adverse to the Applicant, the Tribunal considers that, in the interests of fairness, the Respondent should inform UN and UNDP staff at New York Headquarters of the Tribunal's determination that the Applicant was not guilty of gross negligence and that his resignation was not tantamount to a summary dismissal for serious misconduct. The Tribunal trusts that the Respondent will see fit to take such a measure.

XXXV. The Tribunal wishes to record its appreciation of the informative and helpful presentations of counsel for both parties at the oral hearing held in this case.

XXXVI. In view of the foregoing, the Tribunal decides that:

1. The Applicant's resignation dated 12 May 1994 was effective. The attempted attachment to it of the "understanding" that the Applicant's resignation was tantamount to a summary dismissal for serious misconduct based on the Respondent's conclusion of gross negligence was invalid.

2. The Respondent shall pay $10,000 to the Applicant for the moral injury he sustained.

3. Interest at the rate of eight per cent (8%) per annum, from the date of his separation to the date of payment, shall be paid to the Applicant by the Respondent, with respect to the amount referred to in the last two sentences of paragraph XXXIII.

4. All other pleas are rejected.

(Signatures)

Jerome ACKERMAN
President

Francis SPAIN
Member

Mayer GABAY
Member

New York, 22 November 1995

R. Maria VICIEN-MILBURN
Executive Secretary